STATE OF MICHIGAN
IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee,

vs.

SHYAM MISHRA, M.D., and
SHYAM N. MISHRA, M.D., P.C.,
Jointly and severally,

Defendants-Appellants.

Supreme Court No. 154717
Court of Appeals No. 325133
Macomb County Circuit Court
Case No: 2013-003802-NH
Hon. James M. Biernat, Jr.

BENDURE & THOMAS, PLC
By: MARK R. BENDURE (P23490)
Appellate Counsel for Plaintiff
15450 E. Jefferson Ave., Ste. 110
Grosse Pointe Park, MI 48230
(313) 961-1525
bendurelaw@cs.com

McKEEN & ASSOCIATES, P.C.
BRIAN J. McKEEN (P34123)
JOHN R. LaPARL, JR. (P39549)
Counsel for Plaintiff
645 Griswold, Suite 4200
Detroit, MI 48226
(313) 961-4400
jlaparl@mckeenassociates.com

PLAINTIFF'S BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

CERTIFICATE OF SERVICE

STATEMENT REGARDING JURISDICTION

Plaintiff-Appellee acknowledges that the Court has the jurisdiction, in its discretion, to consider the Application for Leave to Appeal from the Court of Appeals pre-trial decision.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF QUESTIONS PRESENTED

I. DO THIS CASE, AND THE ISSUES IT PRESENTS, WARRANT EXTRAORDINARY PRE-TRIAL REVIEW?

PLAINTIFF/APPELLEE ANSWERS "NO".

II. DID THE COURT OF APPEALS ERR IN RULING ON DEFENDANT'S MOTION FOR SUMMARY DISPOSITION?

PLAINTIFF/APPELLEE ANSWERS "NO".

COUNTER-STATEMENT OF FACTS

Overview

On January 3, 2011, Plaintiff went to the hospital with flu-like symptoms. He was found to be dehydrated and, after performing various tests, the hospital staff determined that Plaintiff was in irreversible kidney failure. As a result he was placed on lifetime dialysis with its attendant morbidity and mortality.

This suit alleges that Defendant[1] failed to take action as required by the relevant standard of care, such as a referral to a nephrologist (kidney specialist), even though Plaintiff's blood tests for several years —contained within Plaintiff's medical chart maintained by Dr. Mishra— demonstrated worsening and eventually irreversible kidney disease. Plaintiff further asserts that if Dr. Mishra had complied with the standard of care, Plaintiff's irreversible kidney failure would have been avoided.

According to Plaintiff, he did not discover the existence of his claim until September 20, 2012. On that date, Plaintiff was seen by Dr. Jukaku Tayeb, a treating nephrologist. According to Plaintiff's testimony:

> "[Dr. Tayeb] came in and what it was, he got full biopsy, not just a short version out of Clinton Henry Ford, out of Detroit. He got that and he read through it and reviewed the case and talked to the pathologist, I guess, and he goes, "I got your

[1] Suit was filed against Dr. Mishra and his Professional Corporation. This Brief uses the singular to refer to Defendant Mishra.

> full pathology report here," and he goes, 'Did your doctor—why didn't you come to a nephrologist?' I said I was with an internist. The internist said everything was fine . . . . Then he started ranting, saying, The doctor should have sent you. I could have kept you off dialysis. You should have come here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have come to a nephrologist early on."

Background Facts

Plaintiff testified that when Dr. Tayeb told him this, he "was shocked. I was dumbfounded. That was like someone punching me in the gut." He testified that before that conversation with Dr. Tayeb he did not know his kidney failure had developed over years and could have been avoided with an earlier referral and treatment. He testified that until then "I thought it happens, it happens." He testified that immediately after this visit with Dr. Tayeb he called his wife and said "Oh, my God. I think Mishra screwed up" and the following day he contacted an attorney. Calculating the six-month discovery period from September 20, 2012, Plaintiff timely initiated this case. The trial court concluded, however, that Plaintiff should have discovered the existence of his claim when he was diagnosed with kidney failure in January of 2011. (Ex. A, pp. 1-2).

Plaintiff's medical chart maintained by Dr. Mishra includes the results of his routine blood tests. Beginning in 2007, lab reports filed within the chart

consistently contained abnormal and worsening levels of two blood measures related to kidney function: creatinine and eGFR.

There is no evidence that Plaintiff was made aware of the repeated and increasingly abnormal findings of kidney disease. Defendant offers no evidence that this was the case. First, on this record it is undisputed that defendant's office never provided Plaintiff with copies of his lab reports. Second, Plaintiff testified that defendant never told him that he had kidney disease or that he might develop kidney disease. Indeed, given Defendant's failure to introduce contrary evidence, Defendant has not even created a question of fact on the issue.

Defendant points out that in a 2008 office note, Dr. Mishra wrote down a diagnosis of "chronic renal failure." However, the note contains no reference to a discussion of this with the patient, i.e. plaintiff, and plaintiff testified that no such discussion ever occurred. Specifically, Plaintiff testified as follows:

> "Q. I'm looking at your records from Dr. Mishra's office, December 22nd, 2008, so this would have been a few days before Christmas at the end of 2008. Dr. Mishra had diagnosed you with chronic renal failure; do you remember that?
>
> A. No, he never told me that.
>
> Q. You don't remember having any discussion with him about that then?
>
> A. No, not at all.

> Q. You had swelling in your legs at that time. Do you remember that?
>
> A. Yes. He said it was because of my weight problem.
>
> Q. So you don't remember any discussion December 2008 about having chronic renal failure?
>
> [objection omitted.]
>
> A. No.
>
> Q. When is the first time you recall having a discussion with Dr. Mishra about kidney failure?
>
> A. He never discussed it with me . . . ."

Defendant has not submitted any evidence indicating that, contrary to Plaintiff's testimony, he discussed this diagnosis with Plaintiff. As noted, the office chart does not indicate that the diagnosis was relayed or discussed with the patient and it is undisputed that Plaintiff neither saw or had copies of those records until after he retained an attorney, immediately following the September 20, 2012 conversation with Dr. Tayeb. (Ex. A, pp. 2-4; footnotes omitted).

> "In the instant case, the record does not support the view that, when diagnosed with kidney failure, plaintiff 'should have known of a possible cause of action.' As far as he knew, he had no previous history of kidney disease and did not know of the lab reports showing that his kidney failure was the result of a slowly progressing condition rather than an acute event."

* * *

Here, Plaintiff's first recognizable symptom, i.e. urine retention, did not occur until January 2011 when it precipitated his hospitalization." (Ex. A, p. 5).

Plaintiff's Testimony

In his deposition (Ex. B), Plaintiff explained the course of his treatment and what he did and didn't know. The records show laboratory values indicating the onset of kidney failure beginning in 2007. In 2008, Plaintiff experienced symptoms of edema. When a kidney function test was performed, Dr. Mishra told Plaintiff, "He said everything was okay, not to worry about anything on the blood work. He never gave me a copy but I called him or my wife called him and he said there was no cause for concern. He said the kidneys was a little bit elevated but not to the point where there was anything to worry about, is what he told me was." (Jendrusina dep., p. 48).

An ultrasound was performed in 2009. Dr. Mishra told Plaintiff, "the kidney test in 2009 came back, my kidneys were fine, with the ultrasound, fine with the ultrasound test" (Jendrusina dep., pp. 51-52).

Only after Mr. Jendrusina visited another doctor did Dr. Mishra mention kidney failure (Jendrusina dep., pp 56-57):

> "Q. When is the first time you recall having a discussion with Dr. Mishra about kidney failure?

> A. He never discussed it with me. I never remember him ever telling me that except after my kidneys failed, I did visit him afterwards, so I was going to a new doctor but I had Mishra for so many years I trusted him, so I went back to him to have him control sinuses, asthma, whatever else. He does hypertension, too. Watch my hypertension and such. That day I went to him he said -- that's the first time he said my kidneys -- he told me my kidneys are going to fail. Up to that time I didn't know nothing."

Plaintiff further explained (Jendrusina dep., p. 73):

> "Q. Did you ever discuss with Dr. Mishra possibly seeing a nephrologist at any point in your treatment with him?
>
> A. No, I was not aware anything was wrong. He told me everything was okay."

On January 3, 2011, Mr. Jendrusina was diagnosed with kidney failure, but had no reason to believe that Defendants had committed malpractice (Jendrusina dep., p. 62). When Plaintiff saw Dr. Tayeb on September 20, 2012, he learned for the first time that Dr. Mishra may have made a mistake (Jendrusina dep., pp. 80-84):

> "Q. Do you remember when you called [an attorney] for the first time?
>
> A. Shortly after September 20th of 2012 once Tayeb said that, went on and on about "why didn't

your doctor send you to one of us and we could have kept you off dialysis and maybe never go on dialysis or prevented kidney failure."

* * *

Q. That's what I figured. Do you recall the first time you discussed it with your wife, "I think something might be wrong here"?

A. As soon as I walked out of the office September 20th I gave her a call. I said, "Oh, my God. I think Mishra screwed up."

* * *

A. "Tayeb went on and said, "Why wasn't your doctor sending you to a nephrologist?" I was shocked, too. I didn't know anything was wrong. I thought it happens, it happens.

Q. All right.

A. I was shocked. So I called my wife after that on the way home. I was dumbfounded. I didn't know what to say. I was totally shocked. And I don't know. So we probably discussed it that night and probably called our friend, Greenup, Ed, within a day, next day or two.

Q. Tell me exactly what you remember Dr. Tayeb telling you at that visit.

A. He came in and what it was, he got full biopsy, not just a short version out of Clinton Henry Ford, out of Detroit. He got that and read

> through it and reviewed the case and talked to the pathologist, I guess, and he goes, 'I got your full pathology report here,' and he goes, 'Did your doctor -- Why didn't you come to a nephrologist?' I said I was with an internist. The internist said everything was fine as long as the creatinine number was down a certain thing, you'd be fine. So he said I need to go. Then he started ranting, saying, 'The doctor should have sent you. I could have kept you off of dialysis. You should have came here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came to a nephrologist early on.'"

In response to a summary disposition motion, Mr. Jendrusina provided his Affidavit (Ex. C). He confirmed:

> 3. "That on September 20, 2012, my treating nephrologist, Dr. Jukaku Tayeb, informed me that the damage to my kidney was not bad in January of 2011, and that I should have been referred to a nephrologist in 2008 when my kidney issues began;
>
> 4. That on September 20, 2012, Dr. Tayeb informed me that if I had seen a nephrologist sooner, my kidney failure and use of dialysis could have been delayed or possibly eliminated with proper care and treatment;
>
> 5. That I first discovered the existence of my claim during the aforementioned conversation with Dr. Tayeb on September 20, 2012;
>
> 6. That after discovering the existence of my claim on September 20, 2012, I promptly

> contacted McKeen & Associates, P.C., on September 25, 2012 in order to obtain representation in my claim against the above named Defendants."

Proceedings in the Circuit Court

Defendant filed a motion for summary disposition under MCR 2.116(C)(7) arguing that the suit was barred by the statute of limitations, MCL 600.5838a. In pertinent part, that statute provides:

> "...[A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."

The timeliness of Plaintiff's suit turns on when he "should have discovered the existence of the claim". Defendant argued that this occurred no later than January of 2011, when Plaintiff was diagnosed with kidney failure. Plaintiff argued that he had no reason to believe that Dr. Mishra had committed malpractice until he was informed by Dr. Tayeb in September of 2012.

By Opinion and Order of October 23, 2014 (Ex. D) and Opinion and Order of November 26, 2014 denying reconsideration (Ex. E), Hon James M. Biernat, Jr., Macomb County Circuit Court Judge, granted summary disposition. In the Court's view, when Plaintiff was diagnosed with kidney failure in January of 2011, he "should have discovered the existence of the claim" (Ex. D, pp. 3-4).

The Court of Appeals Decision

The Court of Appeals reversed. The majority Opinion of Judges Shapiro and Gleicher, with Judge Jansen dissenting, began by looking to the language of MCL 600.5838a. The panel noted the Legislature's use of the phrase "should have" rather than "could have" (Ex. A, pp. 1, 2, 7). Citing several dictionaries, the panel noted:

> "Significantly, we note that the legislature chose the phrase 'should have' rather than 'could have' in the statutory text. According to the New Oxford American Dictionary (3rd ed), 'could' is 'used to indicate possibility' whereas 'should' is 'used to indicate what is probable.' (Emphasis added). Thus, the inquiry is not whether it was possible for a reasonable lay person to have discovered the existence of the claim; the inquiry is whether it was probable that a reasonable lay person would have discovered the existence of the claim." (footnote omitted).

Discussing and distinguishing this Court's decision in Solowy v Oakwood Hospital, 454 Mich 214 (1997) (Ex. A, pp. 4-5), the Court rejected Defendants' argument that an untoward medical event, like the diagnosis of kidney failure on January 3, 2011, necessarily means that the patient "should have discovered the existence of the [malpractice] claim" by the earlier treating physician who repeatedly reassured the patient that his laboratory results were no cause for concern (Ex. A, pp. 5-7). The Court concluded (Ex. A, p. 7):

> " To hold as defendant suggests would not merely be inconsistent with the text of the statute. It would also be highly disruptive to the doctor-patient relationship for courts to advise patients that they "should" consider every new diagnosis as evidence of possible malpractice until proven otherwise. Had the legislature intended such a result it would have use the phrase 'could have discovered,' not 'should have discovered.'
>
> On the present facts, defendant has demonstrated that before the September 20, 2012 meeting with Dr. Tayeb, plaintiff could have discovered that he had a possible cause of action for malpractice. However, the statute triggers the six-month discovery period only when plaintiff should have discovered that he had a possible cause of action. Given the plain language of the statute, the trial court erred in granting defendant's motion for summary disposition."

Judge Jansen dissented. She believed that, "the limitation period began to run when Plaintiff learned that he had kidney failure in January 2011".

The decision below remanded the case to the circuit court for trial on the merits. Defendants now seek pre-trial Supreme Court review.

LAW AND ARGUMENT

I. THIS CASE, AND THE ISSUES IT PRESENTS, DO NOT WARRANT EXTRAORDINARY PRE-TRIAL REVIEW

Defendant's Application, pp. 10-12, focuses on the legal merits of the trial court's decision (Issue II, infra). He pays scant attention to the threshold question: whether there is any compelling reason to depart from the ordinary practice of reserving appellate review for "final judgments". Understandably so. There is no special reason to commit this Court's resources to a pre-trial appeal.

Undoubtedly, Defendant will be entitled to seek Supreme Court review in the event of an unfavorable outcome at trial. At that juncture, he will have every opportunity to raise any issue that has arisen, and any others that may arise in the future. The question now presented is whether he is to be allowed an additional bite at the appellate apple. Concededly, this Court may entertain an interlocutory appeal. However, interlocutory review is an extraordinary procedure, compromising as it does the State's settled policy against piecemeal appeals. For the reasons which follow, there is nothing so extraordinary about this case as to warrant such an extraordinary procedure.

A number of public policies and considerations impel the conclusion that Applications for interlocutory review must necessarily be viewed with a jaundiced

judicial eye. The Application in this case falls far short in seeking favored appellate treatment.

Observers are aware of the heroic efforts of the Judges of this Court to oversee the State's system of justice. Justices must attend to administrative responsibilities, decide Applications and issue scholarly Opinions. The finite resources of this Court help define the limited judicial energies left for cases seeking pre-trial review. To grant leave to appeal in any interlocutory matter is *ispo facto* to reduce the quantity or quality of justice available to those appealing from final judgments. Simply as a matter of allocating precious judicial resources, those resources must ordinarily be directed toward final judgments rather than interlocutory orders.

Adherence to the practice ordinarily requiring a final judgment before appellate review helps keep the appellate docket manageable. If, for example, the parties come to realize that it is in their best interests to resolve their differences, there will never be any need for this Court to decide the issue which Defendant now seeks to present. Likewise, if Defendant were to prevail at trial, there would be no need for him to pursue an appeal. It would be improvident to commit the already sorely-taxed resources of this Court to a case which may proceed to a satisfactory resolution if the parties are left alone.

If this Court granted leave to appeal, it would not avoid the possibility that all the other issues of the case, including those which develop during trial, may be presented to the Court after final judgment. Judicial efficiency is far better served by review of all issues at one time rather than repeated piecemeal decisions.

All of these reasons, we suggest, compel the view that, from the perspective of this Court, interlocutory appeals are strongly disfavored and are to be allowed only in the most compelling circumstances. Any application seeking interlocutory review is to be viewed against the backdrop of a strong presumption that it must be denied.

The interests of the parties, as well as those of the Court, compel application of the doctrine that piecemeal litigation is disfavored. A grant of leave for interlocutory review will require the litigants to invest substantial time and expense in briefing and arguing the case before this Court. Trial, and thereafter ultimate disposition of the case on the merits, will be delayed for a number of years. Plaintiff will be relegated to further delay in pursuing a presumptively meritorious cause of action.[2] If successful at trial, Plaintiff will then be faced with the prospect of further delay while Defendants pursue an additional appeal, at that time of right.

---

[2] For purposes of appellate review of a decision made prior to trial on the merits, the allegations of the Complaint must be accepted as true. Severance v Oakland Supervisors, 351 Mich 173, 174 (1958); Love v Wilson, 346 Mich 327, 329 (1956).

Against this array of reasons why leave should be denied, Defendant offers no persuasive claim that he will sustain substantial harm by awaiting a post-judgment appeal of right. He only complains that denial of his summary disposition motion allows the case to continue to trial. That is hardly noteworthy, as every summary disposition denial allows the case to proceed. A trial on the substantive merits is exactly what our system of justice strives to offer. The prospect of a verdict on the merits is a far cry from "substantial harm".

The fact that denial of a summary disposition motion requires a defense at trial in this case leaves Defendant in no different position than that of any other movant that loses one of the hundreds of dispositive motions decided every week across the State. In adopting MCR 7.203(A), this Court declined to make summary disposition denials appealable of right by non-governmental litigants. That policy judgment by the Supreme Court puts to rest Defendant's thesis that denial of a dispositive motion constitutes "substantial harm" justifying an interlocutory appeal.

Nor is there anything remarkable about the Court of Appeals decision. That Court simply applied settled dispositive motion jurisprudence to the unique facts. The case may be interesting, and is no doubt of great significance to the parties, but is still but one of hundreds of disputes pending across the State, each with its own

unique factual twists. There is nothing special about the case or its issues that demands preferential treatment.

Nor is there any burning, unsettled legal issue involved. The appellate court simply, and correctly, recognized that statutes are to be construed and applied as written. There is nothing earth-shattering about the proposition that the judiciary must honor the Legislature's use of the phrase "should have discovered" rather than "could have discovered" to describe the scope of the "discovery" rule.

At best, the issue Defendant seeks to present involves the application of a statute, whose meaning is not in dispute, that looks to what a reasonable person would conclude from disputed facts. Ultimately, that is an issue for the jury, the constitutional finder of fact. The application of the law to specific facts is for the jury and for the review of an intermediate appellate court, not a Supreme Court of last resort.

In short, Defendant presents inadequate justification for an extraordinary pre-trial appeal. For that reason, the Application for Leave should be denied.

II. THE COURT OF APPEALS DID NOT ERR IN ITS RULING ON DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Defendant's Application falls short of the mark for a second, separate, reason. The Court of Appeals decision was not erroneous; it was substantively correct.

A. THE CONTROLLING LEGAL STANDARDS

1. The Standards of MCR 2.116(C)(7)

Defendants' summary disposition motion was brought under MCR 2.116(C)(7) ("statute of limitations"). The standards used in deciding a (C)(7) motion were discussed in Maiden v Rozwood, 461 Mich 109, 119 (1999):

> " Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. Patterson v Kleiman, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994)."

A motion under MCR 2.116(C)(7) presents an affirmative defense. MCR 2.111(F)(3)(a). A defendant that interposes or relies on an affirmative defense like this bears the burden of proof and persuasion on it. Booth Newspapers v U of M Regents, 93 Mich App 100, 109 (1979); Pollack v Oak Office Building, 7 Mich App 173, 198 (1967); Cooper v Tranter Mfg, Inc, 5 Mich App 71, 76 (1966).

Where the movant believes an immunity or limitation defense under MCR 2.116(C)(7) is established on the face of the Complaint, the movant may proceed without supporting factual documents. In that event, "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant", Maiden, supra; Puskulich v Ironwood, 247 Mich App 80, 82 (2001);

Novak v Nationwide Mut Ins Co, 235 Mich App 675, 681 (1999). Under that approach, a limitation defense can only be the basis for summary disposition if the Complaint facially demonstrates the merits of the defense - - the same standard as under MCR 2.116(C)(8) ("fail[ure] to state a claim").

In that regard, a (C)(8) motion looks only to the facial adequacy of the Complaint, not the factual support for the allegations. MCR 2.116(G)(5). The Supreme Court observed in Wade v Department of Corrections, 439 Mich 158, 162-163 (1992):

> "MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, tests the legal sufficiency of the complaint and allows consideration of only the pleadings. MCR 2.116(G)(5); Scameheorn v Bucks, 167 Mich App 302, 306; 421 NW2d 918 (1988). Under both subrules, all well-pleaded allegations are accepted as true, and construed most favorably to the non-moving party. Scameheorn, supra, at 306; Haywood v Fowler, 190 Mich App 253, 256; 475 NW2d 458 (1991). A court may only grant a motion pursuant to MCR 2.116(C)(8) where the claims are so clearly unenforceable as a matter of law that no factual developments could possibly justify recovery. Scameheorn, supra, at 306."

Under Rule 2.116(C)(8), the court must accept as true the pleaded facts and the inferences which might be drawn from those facts. Rosenberg v Rosenberg Bros, 134 Mich App 342, 351 (1984); Ambro v American National Bank, 152 Mich App 613, 616-619 (1986); Gardner v Wood, 150 Mich App 194, 198 (1986).

At bottom, the Court must simply determine whether "the claim is so clearly unenforceable as a matter of law that no factual developments could possibly justify recovery". Wade, supra; Scameheorn v Bucks, 167 Mich App 302, 306 (1988); Gardner, supra; Harris v Detroit, 160 Mich App 223, 226 (1987).

Here, the Complaint, on its face, pleads a cause of action which is timely under MCL 600.5838a(3), "within 6 months after the plaintiff discovers or should have discovered the existence of the claim". As a challenge to the pleaded facts, Defendant's motion fails, as Plaintiff has alleged a cause of action which is timely.

This case falls within a different class of (C)(7) motion, which arises where the availability of the defense is fact dependent. As in this case, a statute of limitations defense may depend on the factual question of when the cause of action was, or should have been, "discovered". Where reasonable minds can differ, "discovery" is an issue of fact for the jury. Moll v Abbott Laboratories, 444 Mich 1, 26-29 (1993); Kincaid v Cardwell, 300 Mich App 513, 523 (2013); Simmons v Apex Drug Stores, Inc., 201 Mich App 250, 254 (1993); Kermizian v Sumcad, 188 Mich App 690, 691-694 (1991).

2. The Standards of MCR 2.116(C)(10) ("No Genuine Issue As To Any Material Fact")

When summary disposition depends on an issue of fact - - here, when Plaintiff "should have discovered" the malpractice, - - the facts and all reasonable inferences are viewed favorably to the non-movant. Forge v Smith, 458 Mich 198,

204 (1998); Cacevic v Simplimatic Engineering Co (On Remand), 241 Mich App 670, 679-680 (2001); Weymers v Khera, 454 Mich 639, 640-647 (1997); Bertrand v Alan Ford, Inc., 449 Mich 606, 617-618 (1995); Thomas v Stubbs, 218 Mich App 46, 49 (1996); Hill v GMAC, 207 Mich App 504, 506-507 (1994).

This principle applies to the issue of whether there was fraudulent concealment or discovery of the cause of action to extend the limitation period. Where there is a disputed issue of fact, on which reasonable minds may differ, the issue is for the jury. Winfrey v Forhat, 382 Mich 380, 388 (1969); Kermizien v Sumcad, 188 Mich App 690 (1991); Moss v Pacquing, 183 Mich App 574, 580-581 (1990); Schalm v Mt. Clemens General Hospital, 82 Mich App 669, 672 (1978); Corley v Logan, 35 Mich App 199, 203 (1971).

3. Statutory Construction

This appeal entails the construction and application of MCL 600.5838a. As this Court has often stressed, where legislative language is clear, the judicial duty is to apply the literal language. Sun Valley Foods Co v Ward, 460 Mich 230, 236 (1999); Mudel v Great A&P Tea Co, 461 Mich 691, 706 (2000).

As a corollary to that principle, a court cannot create judge-made exceptions or limitations which the drafters did not include. In re Hurd-Marvin Drain, 331 Mich 504, 509 (1951); Ford Motor Co v Unemployment Compensation

Commission, 316 Mich 468, 473 (1947); Alexander v MESC, 4 Mich App 378, 383 (1963).

4. Appellate Review

This Court reviews summary disposition rulings de novo, applying the same principles, discussed above, that a trial court must apply. Spiek v Dept. of Transportation, 456 Mich 331, 339 (1998); Ardt v Titan Insurance Co., 233 Mich App 685, 688 (1999); Maskery v U of M Board of Regents, 468 Mich 609, 613 (2003); Walsh v Taylor, 263 Mich App 618, 621 (2004).

B. THE COURT OF APPEALS COMMITTED NO ERROR IN CONCLUDING THAT REASONABLE MINDS MAY DIFFER ON THE ISSUE OF WHEN PLAINTIFF "SHOULD HAVE DISCOVERED" THE MALPRACTICE

Return now to the critical language of MCL 600.5838a(3). The six month discovery period begins to run "within 6 months after plaintiff discovers or should have discovered the existence of the claim". That clause includes two different standards, one of them subjective: "discovers". Defendant offers no argument that Plaintiff actually "discovered" the possible malpractice before seeing Dr. Tayeb. Defendant's argument reduces to the proposition that, even though Plaintiff did not actually "discover", his claim is barred because he "should have discovered the

existence of the claim" - - i.e., that a hypothetical reasonable person objectively should have known that he had a malpractice "claim".

The appellate court's focus on the statutory language is unassailable. This Court, in the past twenty years or so, has emphasized that statutes are to be applied as written, heeding the Legislature's use of one phrase rather than another. Similarly, the practice of looking to dictionaries for the common meaning of statutory language is well-established. In short, there is nothing remotely erroneous about the appellate court's interpretation of the phrase "should have discovered" as connoting that a reasonable person would probably discover the claim, in contrast to the phrase "could have discovered" which the Legislature opted not to use.

Defendant's reliance on the Solowy decision misses the point. That case focused on an altogether different phrase in the clause, "the existence of the claim". This Court regarded the phrase as meaning "the existence of a possible claim". The interpretation of the phrase "existence of a claim" is not at all at odds with the appellate decision in this case construing a different phrase, "should have discovered".

The Court of Appeals correctly discussed at length the critical differences between this case and Solowy. There is simply nothing in the decision below that conflicts with Solowy.

Defendant's argument reduces to the proposition that an adverse medical event (here, renal failure) necessarily means that the patient "should have discovered" not just the medical complication, but that it was caused by malpractice. See Kermizian v Sumcad, 188 Mich App 690 (1991) (a defendant opposing application of the discovery rule, must show that "the plaintiff... ha[d] reason to believe that the medical treatment was improper or was performed in an improper manner"); Simmons v Apex Drug Stores, Inc, 201 Mich App 250, 254 (1993). By the plain statutory language, actual or constructive notice of the "existence of the claim" is essential to Defendant's statute of limitations challenge, and knowledge of an unfavorable medical outcome is not the same.

So it is here. The fact that Plaintiff's medical progress was not optimal does not mean that he "should" have concluded that the cause was malpractice by Mishra ("should have discovered the existence of the claim"). Ultimately, the issue of what a hypothetical "reasonable" patient "should have discovered", is a question for the jury. Simmons, supra; Jackson v Vincent, 97 Mich App 568, 572 (1980); Kelleher v Mills, 70 Mich App 360, 365 (1976); Kincaid v Cardwell, 300 Mich App 513, 523 (2013). This is especially so since the issue of what a reasonable person would do is uniquely within the community judgment of lay jurors. Moning v Alfono, 400 Mich 425, 435-436 (1977); Miller v Miller, 373 Mich 519 525 (1964).

The Court of Appeal also correctly noted the policy reasons for the Legislature's use of the "should have known" standard. To accept Defendant's approach would mean that patients should file a malpractice case whenever the result was not as good as hoped. That approach is at odds with M. Civ. J. I. 30.04, "... A doctor is not liable merely because of an adverse result...".

Precisely. An adverse result does not, by itself, imply that the patient "should have known of the existence of [malpractice]". For this reason, the Court of Appeals committed no error. The Court should deny leave to appeal.

RELIEF SOUGHT

WHEREFORE Plaintiff KERRY JENDRUSINA prays that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

BENDURE & THOMAS, PLC

/s/ Mark R. Bendure
By: MARK R. BENDURE (P23490)
Appellate Attorneys for Plaintiff
15450 E. Jefferson Avenue, Suite 110
Grosse Pointe Park, Michigan 48230
(313) 961-1525
bendurelaw@cs.com

McKEEN & ASSOCIATES, P.C.

BRIAN J. MCKEEN (P34123)
JOHN LaPARL, JR. (P39549)
Attorneys for Plaintiff
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
jlaparl@mckeenassociates.com

Dated: December 29, 2016